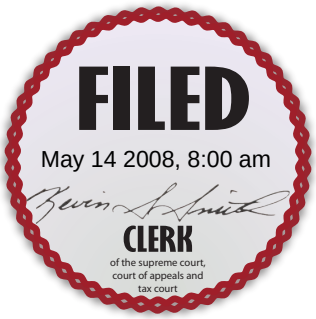

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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY A. BENNINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A05-0707-CR-364
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable G. Thomas Gray, Judge
Cause No. 55D01-0610-MR-00333

May 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, JUDGE

Case Summary[1]

Following his plea of guilty to Class A felony voluntary manslaughter for stabbing his father-in-law forty-five times with a knife in the presence of his wife, son, and daughter, Timothy A. Bennington appeals his maximum sentence of fifty years. Concluding that the trial court did not abuse its discretion in failing to identify several mitigators and that Bennington's sentence is not inappropriate in light of the nature of the offense and his character, we affirm his sentence.

Facts and Procedural History

On October 23, 2006, the State charged Bennington with murder for killing his father-in-law Charles Mason with a knife. The State later added a charge of Class A felony voluntary manslaughter. On March 16, 2007, Bennington pled guilty to Class A felony voluntary manslaughter, and the State dismissed the murder charge. According to the plea agreement, "[t]he Court shall determine the sentence *at no less than the advisory sentence of 30 years up to the statutory maximum sentence of 50 years executed at the IDOC* and any suspension of the sentence over the minimum agreed sentence of 30 years is at the discretion of the Court." Appellant's App. p. 147. At the guilty plea hearing, the State presented as a factual basis for the guilty plea that on October 20, 2006,

[1] We note that Bennington included a copy of the presentence investigation report on white paper in his appendix. *See* Appellant's App. p. 136-146. We remind Bennington that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

Bennington, who was intoxicated, and his father-in law, Mason, began pushing each other in Bennington's Martinsville, Indiana, home. After the two wrestled, Bennington grabbed a knife away from Mason and then stabbed Mason approximately forty-five times in the presence of Bennington's wife, six-year-old son, and sixth-month-old daughter.

A sentencing hearing was held on June 1, 2007. At the conclusion of the hearing, the trial court identified as aggravators that at the time of the offense Bennington was on probation for domestic battery—a crime of violence—and was ordered not to consume alcoholic beverages as part of his probation; the nature and circumstances of the crime, specifically, he stabbed his father-in-law forty-five times; and "the most serious aggravator" was that Bennington committed the offense in the presence of his six-year-old son, who screamed in protest to what his father was doing to his grandfather yet Bennington continued stabbing him. Tr. p. 92. The court identified as a mitigator that this was a crime of passion but indicated that Bennington had already received the benefit of this mitigator by pleading guilty to voluntary manslaughter. The trial court sentenced Bennington to fifty years. Bennington now appeals his sentence.

Discussion and Decision

Bennington contends that the trial court erred in failing to identify several mitigators and that his sentence is inappropriate.

I. Mitigators

Bennington contends that the trial court erred in failing to identify several mitigators. Sentencing decisions rest within the sound discretion of the trial court and are

reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. There are several ways a trial court may abuse its discretion. *Id.* One way is for the court to enter a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 491.

Bennington first argues that the trial court failed to identify as a mitigator that Mason was the one who introduced the knife into their altercation and therefore induced or facilitated the offense. *See* Appellant's Br. p. 8 (citing Ind. Code § 35-38-1-7.1(b)(3)). Although it is undisputed that Mason first possessed the knife, by all accounts Bennington was the one who precipitated the argument by calling his wife (Mason's daughter) names and by pushing Mason. In addition, in light of the fact that Bennington stabbed his father-in-law forty-five times, which one officer described as resembling a "hunter . . . gutting a deer," Tr. p. 51, there is nothing that Mason did to induce or facilitate such an offense. Accordingly, the trial court did not abuse its discretion in failing to identify as a mitigator that Mason induced or facilitated this offense.

As part of the above argument, Bennington asserts that the trial court failed to consider that Mason was under the influence of controlled substances and was not taking his prescribed medication for his anger management issues, which allegedly caused him to induce or facilitate this offense. However, the record shows that the State wanted the trial court to consider this very evidence as an aggravator. Specifically, as for the

controlled substances, the State wanted the trial court to consider as an aggravator that the autopsy report showed that Mason tested positive for controlled substances above the therapeutic level because Mason must have been "in so much pain" and therefore was a sympathetic victim. *Id.* at 87. In addition, the State argued that Mason was a sympathetic victim because he suffered from a psychiatric illness and was under the care of a psychiatrist for most of his adult life. *See id.* at 87-88. However, the trial court concluded that Mason's "physical and mental issues at the time of the offense [are] not before the Court and will not be considered." *Id.* at 91. Bennington claims that the trial court should have considered this very evidence to be mitigating. Bennington offers neither authority nor evidence that Mason's medication issues caused him to induce or facilitate *this* offense. Accordingly, the trial court did not abuse its discretion in failing to identify this evidence as mitigating.

Bennington next makes a *one-sentence* argument that the trial court erred in failing to identify his remorse as a mitigator. *See* Appellant's Br. p. 8. Bennington points to no evidence in the record to show his remorse and has therefore waived this issue. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, although Bennington testified at the sentencing hearing that he was "responsible for Charlie's death" and "will be forever remorseful," he also testified, "You know as well as everybody else that was involved in this case, that I wasn't the first person that he pulled a knife on . . . ." Tr. p. 79-80. The Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial

court, we accept its determination of credibility. *Id.* We find no impermissible considerations here and, therefore, no abuse of discretion in failing to identify this mitigator.

II. Inappropriate Sentence

Although Bennington states in his Statement of Issues and Summary of Argument sections of his brief that he is making an inappropriate sentence argument, he does not analyze this issue in the Argument section of his brief and has therefore waived this issue. *See* App. R. 46(A)(8)(a). Waiver notwithstanding, we address his inappropriate sentence argument.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The Indiana Supreme Court recently reiterated in *Reid* that "[t]he maximum possible sentences are generally most appropriate for the worst offenders." *Id.* Here, Bennington's offense is for Class A felony voluntary manslaughter, for which the sentencing range is twenty to fifty years, with the advisory sentence being thirty years.

Ind. Code § 35-50-2-4. As for the nature of the offense, Bennington stabbed his father-in-law forty-five times in the presence of his wife, six-year-old son, and six-month-old daughter. Bennington's wife called 911, and according to the trial court, during its review of the 911 call, it "lost count" of how many times Bennington's son screamed "Papaw" while the attack was still occurring. Tr. p. 92. As the trial court said, "To continue committing this type of crime in the face of that is nothing less than one of the most serious aggravators I've ever seen." *Id.* As the trial court aptly stated, this crime was "chilling." *Id.* at 93. As for the character of the offender, it is true that Bennington has a minimal criminal history consisting of misdemeanor domestic battery involving his wife. However, he was on probation for this very crime at the time of this offense. And it was because Bennington called his wife names that this whole tragic event occurred. Bennington has failed to persuade us that his fifty-year sentence is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.